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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARK SHERMAN,

Plaintiff and Respondent,

v.

CITY OF OAKLAND RENT ADJUSTMENT BOARD,

Defendant and Respondent;

DIANE MICHELSEN et al.,

Real Parties in Interest and Appellants.

A152429

(Alameda County
Super. Ct. No. RG16843773)

Mark Sherman has rented a residential unit in Oakland from his landlords, Diane and Harold Rus Michelsen (the Michelsens), for more than 30 years. In 2017, we upheld a decision of the City of Oakland Rent Adjustment Board (Rent Board) exempting Sherman's unit from Oakland's Residential Rent Adjustment Program Ordinance (rent ordinance). (*Sherman v. City of Oakland Rent Adjustment Board* (Apr. 26, 2017, A147769) [nonpub. opn.] (*Sherman I*).) Before we issued that opinion, however, Sherman filed a tenant petition seeking to invalidate the exemption on the grounds of fraud or mistake. When both a hearing officer and the City of Oakland's Rent Adjustment Program rejected his tenant petition *without holding a hearing*, Sherman filed a petition for writ of mandate. The Rent Board subsequently met in closed session and determined Sherman was entitled to a hearing. The Rent Board then brought a motion in the superior court to remand the matter for a hearing. The trial court granted

the motion, remanded the matter for a full hearing, dismissed the case, and entered judgment for Sherman. The Michelsens filed this appeal, arguing the trial court erred because our 2017 appellate opinion finally resolved the question of exemption, and Sherman's tenant petition is barred by res judicata or collateral estoppel.

We affirm. In doing so, however, we emphasize that we express no opinion on the merits of Sherman's tenant petition or whether it is barred by res judicata (claim preclusion) or collateral estoppel (issue preclusion).[1] Because we do not know the basis for Sherman's fraud or mistake claim, we cannot determine whether the issues he seeks to raise by way of his tenant petition were resolved or could have been resolved in our prior appeal.

I. BACKGROUND

We incorporate by reference our entire opinion in *Sherman I, supra,* A147769. We discuss only those facts necessary for resolution of this appeal.

In December 2013, the Michelsens filed a landlord petition with the Rent Board to obtain a certificate exempting Sherman's unit from the rent ordinance. The Michelsens claimed their property was exempt because it qualified as new construction. To qualify as "new construction" a unit had to be entirely newly constructed or created from space that was formerly entirely nonresidential. Sherman sought to defeat exemption by proving the property had been rented for residential purposes prior to 1983. A hearing officer rejected his evidence and granted the exemption, finding the property had not been used for residential purposes prior to 1985, and the owners met the requirements for exemption by a preponderance of the evidence.

The Rent Board upheld the exemption. Sherman filed a petition for writ of mandate in the superior court. On February 23, 2016, the trial court denied Sherman's writ petition and entered judgment in the Michelsens' favor. Sherman appealed.

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[1] Our Supreme Court prefers the terms "claim preclusion" and "issue preclusion" rather than "res judicata" and "collateral estoppel," respectively. (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.) We refer to "res judicata" and "collateral estoppel" in this opinion where those terms are used by the parties or other courts.

While Sherman's appeal was pending, the Michelsens served him with notice of a rent increase from $1,817 to $4,000. Sherman filed a tenant petition with the Rent Board on May 20, 2016, challenging the rent increase and the Michelsens' exemption for his unit on what he stated were new grounds (tenant petition). Sherman contested the exemption based on Oakland Municipal Code sections 8.22.030.B.1.b and c, which provide a certificate of exemption is final "absent proof of fraud or mistake regarding the granting of the certificate." In an attachment to his tenant petition, Sherman explained: "The primary claim in this petition is that the certificate of exemption for the tenant's rental unit was issued as a result of fraud or mistake. Plaintiff will present evidence proving that fraud and mistake. He will prove that his rental unit was used residentially prior to the enactment of the rent ordinance and prior to the issuance of the certificate of occupancy. The issue in this petition differs from the landlord's exemption petition."

In July 2016, the hearing officer rejected Sherman's claim and dismissed his tenant petition without a hearing. Finding the exemption certificate had already been issued, the hearing officer concluded "the Rent Adjustment Program has no jurisdiction over the subject property and cannot address any issues raised in the tenant petition." Sherman appealed that determination to the Rent Board, but it never heard his appeal. Instead, the Rent Adjustment Program (RAP) administratively dismissed Sherman's appeal to the Rent Board, stating the trial court had issued a judgment affirming the exemption and the matter was pending final resolution in the appellate court.

After the RAP denied his tenant petition, Sherman filed a petition for writ of mandate in the trial court on December 28, 2016. Sherman contended the "administrative decisions of the Hearing Officer and the Rent Board deprived him of his basic due process rights to present evidence that the certificate of exemption was wrongly conferred." He asserted the hearing officer and Rent Board abused their discretion by denying him a full hearing on the merits and sought a writ of mandate ordering the RAP to set aside its decision.

On April 26, 2017, this court issued our opinion in *Sherman I*, *supra*, A147769, affirming the Rent Board's issuance of a certificate of exemption for Sherman's unit.

After our decision, the Rent Board met in a closed session and concluded Sherman was entitled to a hearing on his tenant petition contesting the exemption certificate on the grounds of fraud or mistake. The Rent Board then filed a motion for remand in the superior court. The superior court granted the motion, dismissed the case, and entered judgment for Sherman. The Michelsens appealed.

II. DISCUSSION

Despite its complicated procedural history, the central question in this appeal is a straightforward one: whether the trial court erred by remanding the case for a hearing on Sherman's tenant petition or whether, as the Michelsens argue, the trial court should have denied the writ petition "on the merits" and concluded Sherman cannot obtain a hearing because his tenant petition is barred by res judicata or collateral estoppel. On this record, we conclude the trial court appropriately remanded the matter for an administrative hearing on Sherman's tenant petition. As we emphasize below, however, we do not decide whether Sherman may be able to prove his claim, nor do we express any opinion whether Sherman's new tenant petition will be barred by claim preclusion or issue preclusion.[2]

A. *Sherman's Due Process Right to a Hearing*

Sherman argues on appeal, as he did below, that the hearing officer and Rent Board violated his due process rights by denying him the opportunity to present evidence of fraud or mistake in the granting of the exemption certificate. Because these contentions are pure questions of law, involving application of the due process clause, we exercise our independent judgment. (*Mohilef v Janovici* (1996) 51 Cal.App.4th 267, 285.)

[2] At oral argument, Sherman's counsel stated that a hearing officer subsequently held a full hearing on the merits of Sherman's petition at which he prevailed. Because this information is outside the record, we do not consider it. (See *In re K.M.* (2015) 242 Cal.App.4th 450, 455–456 [appellate courts do not normally consider matters outside the superior court record].)

The parties do not dispute the rent ordinance authorizes a hearing officer to conduct administrative evidentiary hearings to adjudicate owner and tenant petitions. (Oakland Mun. Code, §§ 8.22.090, 8.22.110.) A tenant may contest a prior certificate of exemption based on "fraud or mistake regarding the granting of the certificate." (Oakland Mun. Code, §§ 8.22.030.B.1.c ["Timely submission of a certificate of exemption previously granted in response to a petition shall result in dismissal of the [tenant's] petition *absent proof of fraud or mistake regarding the granting of the certificate. The burden of proving such fraud or mistake is on the tenant*." (italics added)]; 8.22.030.B.1.b ["A certificate of exemption is a final determination of exemption *absent fraud or mistake*." (italics added)].)

Sherman submitted his tenant petition challenging his rent increase and the Michelsens' certificate of exemption in May 2016, almost a year before this court decided *Sherman I*, *supra*, A147769. He checked a box on the RAP tenant petition form to indicate he was challenging the exemption. On an attachment to the form, he cited Oakland Municipal Code sections 8.22.030.B.1.b and c, and stated "the primary claim in this petition is that the certificate of exemption for the tenant's rental unit was issued as a result of fraud or mistake. Plaintiff will present evidence proving that fraud and mistake."

Courts apply principles of due process to determine whether administrative hearings are fair. (See *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737; *Hall v. Superior Court* (2016) 3 Cal.App.5th 792, 808.) Due process requires a meaningful opportunity to be heard. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 543.) Here, Sherman's petition identified a valid basis under the rent ordinance for contesting a prior exemption—fraud or mistake. (Oakland Mun. Code, § 8.22.030.B.1.c.) He was entitled to a hearing on that issue. (Oakland Mun. Code, § 8.22.110.A ["A hearing shall be set before a Hearing Officer to decide the issues in the petition."].) Because the hearing officer and Rent Board denied his tenant petition without a hearing, however, he had no opportunity to present his

evidence or have his claim adjudicated on the merits. Thus, the trial court appropriately ordered remand for the agency to conduct a hearing on the merits of Sherman's tenant petition.

We reject the Michelsens' argument that Sherman's tenant petition did not plead fraud or mistake with sufficient specificity. Sherman checked the box on what appears to be the RAP's standard form for tenant petitions. The Michelsens cite legal authority regarding the standard for pleading fraud in a civil complaint, but no authority those requirements apply in Rent Board proceedings. Indeed, the rent ordinance does not prescribe any pleading requirements for challenging a certificate of exemption based on fraud or mistake. (See Oakland Mun. Code, § 8.22.090.A.4.a [tenant contesting exemption must provide completed tenant petition on form prescribed by RAP].)

B. *Claim Preclusion and Issue Preclusion*

The Michelsens also argue Sherman is not entitled to a hearing because his tenant petition is barred by res judicata and collateral estoppel.

" 'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' " (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) "Res judicata and collateral estoppel can be applied to administrative decisions generally." (*Noble v. Draper* (2008) 160 Cal.App.4th 1, 11.)

As an initial matter, neither the hearing officer nor the RAP could have concluded Sherman's fraud or mistake claim was barred by our decision in *Sherman I*, *supra*, A147769, because we had not issued our opinion when they denied his tenant petition. Thus, there was no final judgment on the merits allowing the Michelsens to invoke the claim preclusion or issue preclusion doctrines at those times.

More significantly, however, to determine whether the claims raised in Sherman's tenant petition are barred by claim preclusion or issue preclusion, we would need to know

the precise nature of his claims. But the record is not sufficiently clear to make such a determination.

Sherman's tenant petition alleged: "The primary claim in this petition is that the certificate of exemption for the tenant's rental unit was issued as a result of fraud or mistake. Plaintiff will present evidence proving that fraud and mistake. He will prove that his rental unit was used residentially prior to the enactment of the rent ordinance and prior to the issuance of the certificate of occupancy. The issue in this petition differs from the landlord's exemption petition." Later he reiterates, "Mr. Sherman's petition should not be dismissed, as he is prepared to prove that the certificate was issued as a result of fraud and mistake." The nature and scope of Sherman's claim of fraud or mistake is unclear from these vague allegations and thus, we do not know whether Sherman's tenant petition attempts to relitigate the same issues adjudicated in the prior appeal or not. But it *is* clear, as discussed above, he had a due process right to a hearing on that issue.[3]

We emphasize we are not deciding the merits of the Michelsens' res judicata or collateral estoppel arguments. That decision is for the hearing officer and Rent Board in the first instance, and for the trial court in a new petition for writ of mandate depending on the outcome of the administrative hearing process. At this juncture, we decide only that the record is inadequate for us to say, *as a matter of* law, that Sherman cannot prove a claim of fraud or mistake in the granting of the exemption.

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[3] Although the Michelsens argue Sherman's petition may only be heard if it is based on "extrinsic" fraud (or mistake) rather than "intrinsic" fraud, we take no position on that issue which is for the hearing officer, Rent Board, and trial court to decide first based on a developed record. We likewise decline the Michelsens' counsel's suggestion at oral argument that we direct the hearing officer and/or trial court on remand they may only consider evidence of "extrinsic fraud," as the admissibility and probative value of such evidence is for the hearing officer's determination in the first instance. We also reject the Michelsens' argument the trial court improperly granted the writ of mandate without "reaching the merits." (See, e.g., *Hall v. Superior Court*, *supra*, 3 Cal.App.5th at p. 811 [having remanded for new hearing, trial court should not address merits of administrative decision].)

III. DISPOSITION

The trial court's July 12, 2017 order is affirmed. The parties are to bear their own costs on appeal.

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Margulies, Acting P. J.

We concur:

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Banke, J.

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Sanchez, J.

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